IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONY KOLE and GHOST INDUSTRIES, LLC, an Illinois limited liability company,	)	
Plaintiffs,	)	
v.	)	Case No. 11 CV 3871
VILLAGE OF NORRIDGE, an Illinois municipal corporation,	)	
Defendant.	)	

PLAINTIFFS' RESPONSETO DEFENDANT'S L.R.56(a)(3) STATEMENT OF UNDISPUTED FACTS

NOW COME the Plaintiffs, Tony Kole and Ghost Industries, LLC, an Illinois limited liability company, by and through undersigned counsel, and, for their Response to Defendant's F.R.Civ.P. **56(a)** Statement of Undisputed Facts, states as follows:

1. Filed in support of the Village's Motion for Summary Judgment are the following:

Ex. 1 – Deposition of Tony Kole of Aug. 8, 2014
Ex. 2 – Deposition of Tony Kole of Feb. 19, 2016
Ex. 3 – Transcript of Proceedings of August 18, 2014
Ex. 4 – Email of Aug. 10, 2010 to Village from Plaintiff regarding Application
Ex. 5 – Aug. 18, 2010 Office Lease
Ex. 6 – Aug. 13, 2010 letter James R. Carlson to Plaintiff
Ex. 7 – Photographs of Offices at 7601 W. Montrose
Ex. 8 – Nov. 30, 2010 Agreement
Ex. 9 – Original Weapons Dealer Ordinance (1972)
Ex. 10 – Revised Weapons Dealer Ordinance (Feb. 9, 2011)
Ex. 11 – New Weapons Dealer Ordinance (Dec. 11, 2013)
Ex. 12 – 2014 Weapons Dealer Ordinance (Dec. 10, 2014)
Ex. 13 – Nov. 15, 2010 – Letter Kole to Chester
Ex. 14 – Nov. 24, 2010 – Email, Kole to Chester
Ex. 15 – Nov. 24, 2010 – Email, Chester to Kole
Ex. 16 – Nov. 29, 2010 – Email, Kole to Chester
Ex. 17 – Nov. 29, 2010 – Email Chester to Kole

Ex. 18 –Gun-Free School Zones Act of 1990 - H. Jud. Subcomm. (Sep. 6, 1990)
Ex. 19 – Village of Norridge, Zoning Map (2011)
Ex. 20 – Village of Norridge, Comprehensive Plan
Ex. 21 – Map, Norridge Available Land Area for Weapons Dealers
Ex. 22 – Table, Norridge Available Land Area for Weapons Dealers
Ex. 23 – Traffic Count Table
Ex. 24 – Traffic Count Map (Lawrence/Cumberland)
Ex. 25 – Traffic Count Map (Harlem/Irving Park)
Ex. 26 – Traffic Count Map (7601 W. Montrose)
Ex. 27 – Photos of Available Sites
Ex. 28 – Plaintiffs' Phone Records regarding Retail Location Search
Ex. 29 – Plaintiffs' Tax Returns for 2011, 2012, and 2013.

RESPONSE: Admit.

Jurisdiction

2. The court has subject matter jurisdiction over this matter under 28 U.S.C. §1331 based on the federal questions raised in plaintiffs' Third Amended Complaint.

RESPONSE: Admit.

Venue

3. Venue is proper in this Court under 28 U.S.C. §1391 in that the events giving rise to this lawsuit occurred within this District and the defendant is located within this District.

RESPONSE: Admit.

Parties

4. Plaintiff Tony Kole was the president and sole owner of a company that operated as Ghost Industries, LLC, a weapons dealer located in the Village of Norridge, Illinois. (3d Am. Compl ¶2).

RESPONSE: Admit.

5. Ghost Industries, LLC, was a limited liability company which at one time did business in Illinois as a weapons dealer pursuant to a Federal Firearms License. (3d. Am. Compl. ¶3).

RESPONSE: Admit.

6. The defendant Village is an Illinois home rule municipality organized under the laws of the State of Illinois. (3d. Am. Compl. ¶4).

RESPONSE: Admit.

Statement of Undisputed Facts

7. Plaintiff Tony Kole was employed as an elevator constructor with Schindler Elevator, doing elevator and escalator repair and maintenance, until he was laid off from that position in 2009. (Ex. 1, p. 11-12).

RESPONSE: Admit.

8. In July, 2010, Kole organized a limited liability company in Illinois named Ghost

Industries, LLC, to operate a weapons sales business over the internet. (Ex. 1, p. 7, 28).

RESPONSE: Admit, though that business model eventually changed (*See* Def's Exh.1 at p.30-31).

9. On August 10, 2010, Kole sent an email to the Village inquiring about applying for a business license to sell weapons in the Village. In the email Kole represented to the Village that his business would sell weapons

> "through Direct and Online sales ONLY. The company and myself have no desire to conduct business at the retail level. We are not going to engage in any person-to-person transfers/sales or store any firearms ammunition within the Village. I am looking to lease office space within the Village for administrative purposes only."

(Ex. 1, p. 26; Ex. 4).

RESPONSE: Admit, though the excerpt contains one typographical error.

10. At the time the Village had a weapons dealer ordinance in place from 1972 when a Kmart located in a commercial district in the Village sold guns ("***Original Ordinance***"). No gun sales businesses were located in the Village for many years. (Ex. 3, p. 205-06).

RESPONSE: Upon information and belief admit, though Plaintiffs have insufficient information to know if Kmart actually sold guns or merely wished to have the option, and the witness who testified about this was not there when it happened (Def's. Exh. 3 at p.205).

11. Kole found a location to open his business at 7601 W. Montrose, in Norridge, Illinois, in a suite of offices that also had separate offices for a lawyer, a dentist, a chiropractor and an Allstate Insurance broker. (Ex. 1, p. 29-30).

RESPONSE: Admit.

12. On August 13, 2010, the owner of the property, James Carlson, sent Kole a letter memorializing a conversation they had in which Kole disclosed to Carlson that his intent was to operate a weapons sales business through online sales only, firearms and ammunition would only be delivered to Plaintiffs' or their employees, and that no weapons would be stored on the premises. (Ex. 1, p. 27-28; Ex. 6).

RESPONSE: Admit to the language contained in Def's Exh.6.

13. On August 18, 2010, Plaintiffs entered into a lease for an interior office at 7601 W. Montrose Avenue, Suite II, Office F ("***Office***"), to begin on October 1, 2010, and expire September 30, 2011. The written lease established the purpose of the lease for an "Internet Retail Sales Office" and prohibited any signs or advertisement on the property, except on the office door. (Ex. 1, p. 28; Ex. 5) Plaintiff's office was not conducive to any type of on-site retail sales business, without a major renovation. (Ex. 1, p. 43; Ex. 7).

RESPONSE: Admit the Lease and its language. Deny signs were prohibited except on the office door, as they were also allowed on the office window, directory board, and "showcases" were allowed in the front of the Building with the Owner's permission. (Def's

Exh.5). Plaintiffs deny the last sentence of Paragraph 13, as Kole testified that the premises would not be inappropriate for a retail space, and never used the word "major" when testifying that renovations would be done in that instance (Def's Exh. 1 at pp. 43-44).

14. Plaintiff's Office is across the street from Ridgewood High School, a public high school that serves students from school districts in the Villages of Norridge and Harwood Heights. The Giles public grade school, Acacia Park Evangelical Lutheran Church, and Northside Arabic Church of the Nazarene are one block south of Plaintiff's Office. Two blocks west of Plaintiff's Office is the Divine Savior Catholic Church and School. (Ex. 3, pp. 7, 50, 178-79; Ex. 21).

RESPONSE: Admit the existence of the schools and church, but Plaintiff has insufficient information to admit or deny the remainder of Paragraph 14.

15. Kole applied for a business license with the Village. The Village, through its attorney, Mark Chester, communicated with plaintiff Kole regarding various conditions for issuance of the business license. Kole was represented by counsel during the discussion (Ex. 3, p 94; Ex. 1, p. 38; Ex. 13 to 17).

RESPONSE: Admit.

16. In a November 15, 2010 letter to Chester (Ex. 13), Plaintiffs stated the following:

Dear Mr. Chester:

Thank you for taking time out of your busy schedule to discuss a resolution of the matter between Ghost Industries, LLC and the Village of Norridge. Per your request, I am restating the negotiable terms that the Company would like to reach an agreement with the Village on:

1. The Company is open to discussing limitations and/or restrictions regarding sales and transfers of firearms and ammunition to non-Law Enforcement Personnel on the premises located at 7601 W. Montrose Ave.;

2. The Company will not store firearms or ammunition on the premises located at 7601 W. Montrose Ave. overnight or longer than 8 hours during the day. Additionally, any firearms in the Company's possession on the premises located at 7601 W. Montrose Ave. will be disabled by a locking device made for use on firearms;

3. The Company will not display any firearms or ammunition on the premises located at 7601 W. Montrose Ave.;

4. The Company will not post or erect any signage indicating to the public that it's offices are located on the premises at 7601 W. Montrose Ave.;

5. The Company will ensure that the only authorized person to receive shipments of firearms and ammunition on behalf of the Company will be the President and Owner of the Company (until the Company can afford to employ others that pass a Criminal Background Investigation);

6. The Company will install and maintain a video surveillance system to record and monitor its office;

7. The Company will voluntarily offer its President for fingerprinting by the Norridge Police Department;

8. The Company will agree to reasonable limitations on the quantity of firearms and/or ammunition it receives during a reasonable time period;

9. The Company will sell the majority of firearms and ammunition to Nonlaw enforcement personnel through internet and direct sales which require that firearms either be "drop shipped" from the Company's distributor or shipped directly to the customer's local Federally Licensed Firearms dealer; and

10. The Company will abide by all local, State, and Federal Laws governing it's business.

Please contact me at your earliest convenience so that we can schedule a meeting to discuss the terms of an agreement and allow the Company to address the Village's concerns with regard to ensuring that the safety of the community is the top priority of the Company.

Regards,

Tony Kole
President
Ghost Industries, LLC
(p) 773.675.2855

RESPONSE: Admit.

17. On November 24, 2010, Kole wrote to Chester discussing a version of an agreement regarding terms reviewed and approved by Ghost Industries' attorney. (Ex. 14).

RESPONSE: Admit.

18. That same day, Chester wrote back to Kole stating:

> Mr. Kole,
>
> I've reviewed your proposal and think that the enclosed is something that I may be able to get my client to agree to. Knowing your desire to hurry this along, I've been forced to send you something which was not pre-approved.
>
> Note first that if you want to deliver weapons to Chicago police officers, then you will have to find a licensed dealer out of the village to make the delivery. Secondly, we cannot agree to modify, or not modify, our ordinances for longer than two years out (three years total). Even if this contract were approved by the Village Board, it would not bind the next village board which will be elected in part in two years.
>
> Please let me know if you agree to these terms. If you do, I will pass this on to Norridge with my endorsement. If not, we can discuss this matter further next week.

(Ex. 15).

RESPONSE: Admit.

19. On November 29, 2010, Kole wrote to Chester stating the following:

> Good morning Mr. Chester:
>
> Please let me know if the Village has accepted your last version of the Agreement. I have executed two copies and am prepared to send them to the mayor once I hear back to you.

(Ex. 16).

RESPONSE: Admit.

20. That same day, Chester responded.

> Tony,
>
> President Oppedisano has preliminarily indicated that it is acceptable. Please sign it and deliver it to him. He will send it to me for checking prior to signing it. As soon as it is approved, we will contact ATF or respond to an ATF inquiry with the information that there appear to be no problems with your location in Norridge.
>
> Just so that we are in agreement, we have agreed on the version 3.1 MVC which I sent to you Wednesday afternoon at 4:45 or thereabouts. If not then call me.

(Ex. 17).

RESPONSE: Admit.

21. On November 30, 2010, Plaintiffs and the Village executed the agreement (the "***Agreement***") regarding various conditions of issuance of the business license. (Ex. 8) The Agreement, *inter alia*, exempted Ghost from any repeal of the Original Ordinance for three

years.

RESPONSE: Admit to the language of the Agreement, but admit to Paragraph 21's characterization.

22. Nearly all of the conditions in the Agreement were conditions required by Plaintiffs' lessor, and conditions suggested by the Plaintiffs.

Terms of Agreement (Ex. 8)	**Terms Proposed by Plaintiff or Required by Plaintiffs' Lessor**
"1. Ghost will not physically deliver any firearm or ammunition to any recipient in the Premises other than to its President and Owner and to its employees that successfully pass a Criminal Background Investigation and possess a valid Illinois FOID card. All deliveries sent from the Premises shall be by unmarked packaging if the delivery is of a "used" firearm and shall be delivered in original packaging as provided by the manufacturer, wholesaler, or distributor if it is a "new" firearm and be in secure packaging sent via post office or courier to a licensed federal firearms dealer (FFL);"	"We are not going to engage in any person-to-person transfers/sales or store any firearms & ammunition within the Village." (Ex. 4). "It is my understanding that firearms and/or ammunition may be delivered to the business address and that you, or your duly authorized employees, and no other individual will be allowed to sign for such shipments." (Ex. 6). "9. The Company will sell the majority of firearms and ammunition to Non-law enforcement personnel through internet and direct sales which require that firearms either be "drop shipped" from the Company's distributor or shipped directly to the customer's local Federally Licensed Firearms dealer;" (Ex. 13).
"2. Ghost will not store firearms or ammunition on the Premises overnight or longer than twelve (12) hours during any day. Additionally, any firearms in Ghost's inventory on the Premises will either be disabled by a locking device made for use on firearms or secured in a locked cabinet;"	"Furthermore, you have informed me that there will be no firearms or ammunition stored on the premises." (Ex. 6). "2. The Company will not store firearms or ammunition on the premises located at 7601 W. Montrose Ave. overnight or longer than 8 hours during the day. Additionally, any firearms in the Company's possession on the premises located at 7601 W. Montrose Ave. will be disabled by a locking device made for use on firearms;" (Ex. 13).
"3. Ghost will not maintain a sales or retail display of any firearms or ammunition on the Premises;"	"The company and myself have no desire to conduct business at the retail level." (Ex. 4). "3. The Company will not display any firearms or ammunition on the premises located at 7601 W. Montrose Ave.;" (Ex. 13).

Terms of Agreement (Ex. 8)	Terms Proposed by Plaintiff or Required by Plaintiffs' Lessor
"4. Ghost will not post or erect any exterior signage indicating to the public that its offices are located on the Premises or indicating the business of Ghost (i.e. weapons sales) and will limit interior signage to that required by state and federal law. Provided, however, that Ghost will be allowed to put its name on one or more interior door to Premises;"	"No sign, advertisement or notice shall be inscribed, painted or affixed on any part of the outside or inside of Building, except on the glass of the doors and windows of the room leased and on the directory board, and then only of such color, size, style, and material as shall be first specified by the Lessor in writing, endorsed on this lease." (Ex. 5). "4. The Company will not post or erect any signage indicating to the public that it's offices are located on the premises at 7601 W. Montrose Ave.;" (Ex. 13).
"5. Ghost will ensure that the only authorized person to receive shipments of firearms and ammunition on behalf of Ghost will be the President and Owner of Ghost (until Ghost can afford to employ others that pass a Criminal Background Investigation and any other applicable requirements of the United States, the state of Illinois, and any other jurisdiction having authority over the Premises);" "6. All officers and employees of Ghost on the Premises will submit to an annual Criminal Background Investigation at Norridge's expense and will provide Norridge with such releases as are necessary to effectuate the investigation;"	"It is my understanding that firearms and/or ammunition may be delivered to the business address and that you, or your duly authorized employees, and no other individual will be allowed to sign for such shipments. (Ex. 6). "5. The Company will ensure that the only authorized person to receive shipments of firearms and ammunition on behalf of the Company will be the President and Owner of the Company (until the Company can afford to employ others that pass a Criminal Background Investigation);" (Def. Ex. 13).
"7. Ghost will install and maintain a video surveillance system to record and monitor its office within the limits of its Lease Agreement for the Premises;"	"6. The Company will install and maintain a video surveillance system to record and monitor its office;" (Ex. 13).
"8. Ghost will voluntarily offer its President and all of its employees for a fingerprinting by the Norridge Police Department at Norridge's expense;"	"7. The Company will voluntarily offer its President for fingerprinting by the Norridge Police Department;" (Ex. 13).

Terms of Agreement (Ex. 8)	Terms Proposed by Plaintiff or Required by Plaintiffs' Lessor
"9. Ghost will agree to receive no more than forty (40) long guns or hand guns at the Premises per month for the first twelve (12) months following the date of this Agreement and the above-referenced amounts shall increase by ten (10) percent twelve (12) months, and twenty four (24) months thereafter, and to have no more than twenty (20) firearms in the Premises at any one time;" "10. Ghost will agree to receive no more than four thousand (4,000) rounds per month for the first twelve (12) months following the date of this Agreement and the above-referenced amounts shall increase by ten (10) percent twelve (12) months and twenty four (24) months thereafter, and to have no more than one thousand (1,000) rounds on the Premises at any one time. Provided, however, larger quantities (not in excess of the monthly amount) may be on the Premises for no longer than one (1) hour after they are delivered from the distributor, wholesaler or manufacturer;"	"8. The Company will agree to reasonable limitations on the quantity of firearms and/or ammunition it receives during a reasonable time period;" (Ex. 13).
"11. Ghost will abide by all local, state and federal laws governing its business including, but not limited to Chapter 22, Article VIII of the Norridge Code of Ordinances — 2002, as may be amended from time to time."	10. The Company will abide by all local, State, and Federal Laws governing it's business." (Ex. 13).

RESPONSE: Admit to the quoted language, but deny the Defendant's characterizations.

23. On February 9, 2011, the Village amended its weapons dealer ordinance (the "***Revised Ordinance***") which phased out any business licenses for weapons dealers as of April 30, 2013. (Ex. 10). Plaintiff was exempted from that amendment until November 30, 2013, based on his Agreement with the Village. (Ex. 8, ¶13).

RESPONSE: Admit.

24. Plaintiff contends that approximately March, 2011, he decided that operating an internet gun sales business at the location was not going to be as profitable as he wanted it to be, and that he needed to operate a retail sales business with outside signage advertising the ability to sell weapons at the site. (Ex. 1, p. 31-32).

RESPONSE: Admit, though that decision came between August, 2011 and February, 2012 (Def's Exh. 1 at p.32).

25. The Agreement restricted plaintiff from delivering any weapons personally to anyone at the site, given its proximity to the high school. Nevertheless, plaintiff was making direct deliveries to purchasers at the site. (Ex. 1, p. 95-96).

RESPONSE: Plaintiffs admit only to the language of the Agreement. Plaintiffs admit they make direct transfers at the premises after all paperwork and State and federal approvals were obtained (Def's Exh. 1 at p. 95-96).

26. Ghost's tax returns show that in 2011 it made profits of $64,053 on gross sales of $341,891. (Ex. 29).

RESPONSE: Admit.

27. Ghost's tax returns show that in 2012 it made profits of $141,162 on gross sales of $663,739. (Ex. 29).

RESPONSE: Admit.

28. Ghost's tax returns show that in 2013 it made profits of $136,450 on gross sales of $435,750. (Ex. 29).

RESPONSE: Admit.

29. Plaintiff filed suit on June 7, 2011, alleging that the conditions in the Agreement were "*ultra vires*," and unconstitutional. (Doc. No. 1).

RESPONSE: Admit the date, and admit to the language of Plaintiffs' Complaint,

30. On October 1, 2011, plaintiffs' lease for 7601 Montrose expired, at which time the tenancy continued under the terms of the written lease on a month-to-month basis. (Ex. 2, p. 15).

RESPONSE: Admit.

31. On December 11, 2013, the Village amended its weapons dealers ordinance (the "***New Ordinance***") to allow retail weapons dealers as a special use in its B-3 General Business District, except within 1000 feet of certain sensitive areas, which included schools, parks, churches, and government buildings. (Ex. 11).

RESPONSE: Admit those terms were part of the "New Ordinance."

32. Norridge is an overwhelmingly residential community, with 62.61% of its total land area zoned for residential use (in the R-1, R-1A, R-2, R-2A, R-3, R-4, R-5 Districts), or 83.48% of the total land area excluding streets. Only 10.32% of the Village's total land area is zoned for commercial uses (in the B-1, B-2, B-3, B-4, B-5 and C Districts), or 13.76% of the total area excluding streets. (Exs. 21, 22).

RESPONSE: Admit the percentages, deny the characterization.

33. 5.5% of all the land in the Village's commercial or business zoning districts was available for weapons dealers under the New Ordinance. (Exs. 21, 22).

RESPONSE: Deny, since Defendant's Exhibit 22 puts the percentages at .76% (excluding roads) and .57% (including roads).

34. The land area available to weapons dealers under the New Ordinance included the two most significant retail clusters in the Village, around Cumberland-Lawrence Avenue and

Harlem-Irving Park corridors. (Ex. 20).

RESPONSE: Admit that Defendant's Exhibit 20 refers to the Harlem-Irving Park intersection as "the most prominent retail cluster" and the Cumberland-Lawrence intersection as "a significant retail cluster" (though the report describes the intersection as "struggling"), but deny that, in practice, any land area at either of those intersections was available to Plaintiffs for use as a firearms sales business (Plaintiffs' SUF 22-30; Def's Exh.3 at 195-96).

35. The average daily traffic counts near these intersections exceeded the average daily traffic counts near the Plaintiffs' business location. (Exs. 23-26).

Location	North of Location	South of Location	East of Location	West of Location
Lawrence-Cumberland	29,300	28,200	18,700	15,800
Harlem-Irving Park	26,500	26,100	21,500	25,100
7601 W Montrose Ave (Plaintiffs' office location)	n/a	n/a	8,700	7,200

RESPONSE: Admit.

36. In enacting the New Ordinance, the Village Board considered several factors, including the availability of weapons sales in surrounding communities, the recognition of areas that have been considered "sensitive" by various sources, and the findings and conclusions of studies leading to and the enactment of the Gun Free School Zones Act, 18 U.S.C. §922 (q)(i). (Ex. 11, p. 1-2).

RESPONSE: Plaintiffs have insufficient information to know what the Village Board "considered," and admits only the language in the New Ordinance.

37. The Village's B-3 Zoning District is a catch-all for all business property uses not included in B-1 and B-2 districts, which are closer to residential areas and designed for more neighborhood compatible businesses. (Ex. 3, p. 203-04).

RESPONSE: Admit the allegations about B-1 and B-3, but deny any such testimony about B-2 (*See* Def's Exh. 3 at p.168 (B-2 is for a business that is incompatible with B-1)).

38. Plaintiffs made no serious effort to open as a retail weapons dealer under the New Ordinance. Plaintiffs spent approximately one hour on the phone looking for a retail location in the Village. (Ex. 28).

RESPONSE: Deny. *See* Plaintiff's SUF 22-30.

39. In March, 2013, Kole was called back to work from his lay-off as an elevator constructor, for a full-time position with Advanced Elevator Co. (Ex. 1, p. 11-12) Kole then hired an independent contractor to operate Ghost on a part-time basis. (Ex. 1, p. 15-16).

RESPONSE: Admit.

40. In April, 2014, Kole went to work as an elevator constructor for Anderson

Elevator Co., for a better opportunity and more overtime. (Ex. 1, p. 12)

RESPONSE: Admit, although Plaintiff Kole testified that the overtime *was* the better opportunity.

41. On December 10, 2014, the Village amended the New Ordinance ("***2014 Ordinance***"), to allow weapons dealers as a special use in B-2, B-3, B-5, and Commercial Zoning districts, not within 500 feet of a sensitive site. (Ex. 12).

RESPONSE: Admit.

42. In August or September, 2014, plaintiff abandoned the site at 7601 W. Montrose and Ghost stopped doing business. (Ex. 2, p. 15-17; 24-25).

RESPONSE: Admit.

WHEREFORE, the Plaintiffs, Tony Kole and Ghost Industries, LLC, an Illinois limited liability company, requests this Honorable Court to deny the Defendant's F.R.Civ.P. 56(a) Motion for Summary Judgment in its entirety, as well as any and all further relief as this Court deems just and proper.

Dated: October 7, 2016

Respectfully submitted,

By: /s/ David G. Sigale
Attorney for Plaintiff

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CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On October 7, 2016, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;

2. Pursuant to F.R.Civ.P. 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

/s/ David G. Sigale
Attorney for Plaintiffs

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